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MICHAEL RODA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-929

DAVID R. McGEORGE CAR CO., INC., *Petitioner*

v.

LEYLAND MOTOR SALES, INC.,

—and—

BRITISH LEYLAND MOTORS, INC., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner David R. McGeorge Car Co., Inc. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on October 1, 1974, and the Order denying Petitioner's Motion for Rehearing on October 30, 1974.

OPINIONS BELOW

The citation for the Opinion of the Court of Appeals is 504 F.2d 52 (1974) and appears in the Appendix hereto. Two Opinions were rendered by the United States District Court for the Eastern District of Virginia, Richmond Division: one entitled "Memorandum Opinion and Order" dated January 9, 1973; and another entitled "Supplemental Memorandum and Order" dated April 10, 1973. Both are unreported and appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on October 1, 1974. A timely Petition for Reconsideration En Banc was denied on October 30, 1974, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Can a defense of "rational business decision" beneficial only to the manufacturer save the manufacturer from liability under the Automobile Dealers Day In Court Act where he refuses to renew an automobile dealer franchise solely because the dealer does not accede to the manufacturer's threats, coercion and intimidation?

2. Can an appeals court reverse a trial court's finding of liability under Section 2(c) of the Clayton Act as amended, by substituting findings of fact directly contrary to the findings of fact made by the trial court?

3. Can an appeals court modify a trial court's factual finding relating to the number of motor vehicles

to be utilized in computing damages on the basis of facts and theories raised for the first time on appeal?

4. Where *per se* standards of liability have been met in a tie-in case under Section 1 of the Sherman Act and Section 3 of the Clayton Act, can a Court deny recovery on the grounds that rule-of-reason standards of liability have not also been met?

STATUTORY PROVISIONS INVOLVED

Automobile Dealers Day In Court Act, 15 U.S.C.A. §§ 1221-1225. (Hereinafter, the "Act") The pertinent text is set forth in the Appendix hereto.

Section 1 of the Sherman Act, 15 U.S.C. § 1. The pertinent text is set forth in the Appendix hereto.

Section 2(c) of the Clayton Act, 15 U.S.C. § 13(c), as follows:

> "Furnishing services or facilities for processing, handling, etc.
>
> (c) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

Section 3 of the Clayton Act, 15 U.S.C. § 14, as follows:

> "§ 14. Sale, etc., on agreement not to use goods of competitor.
>
> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease

or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

STATEMENT OF THE CASE

Leyland Motor Sales, Inc., (hereinafter "Leyland") is a New York corporation which sells and distributes Rover and Triumph automobiles and spare parts to dealers throughout the United States, with the exception of the northeastern portion. Leyland is a wholly owned subsidiary of British Leyland Motors Limited, (hereinafter "British Leyland") which manufactures Rover, Triumph, Jaguar, Austin and MG automobiles. Each of these different make automobiles was distributed throughout the United States through subsidiaries of British Leyland as separate independent dealer networks.

David R. McGeorge Car Co., Inc., (hereinafter "McGeorge") is a Richmond automobile dealer. During the period of 1963 through July, 1970, McGeorge sold Triumph automobiles pursuant to a dealer franchise

agreement with Leyland and its predecessor companies. The contract term of the franchise was two (2) years but was historically and customarily automatically renewed at the end of that period as long as the dealer satisfactorily performed his obligations under that agreement. The last such agreement entered into between McGeorge and Leyland was in July, 1968.

McGeorge was the leading Triumph dealer in Virginia from 1967 through 1969, at all times satisfactorily performed his obligations under the dealer franchise agreement and was considered to be an excellent dealer.

Triumph automobiles had a unique and strong consumer appeal. They were considered to be in a class or market by themselves. Dealers, for example, could sell all the TR-6 model Triumphs supplied and delivered to them by Leyland.

According to trade custom and usage, McGeorge, like all other Triumph dealers, orally ordered cars from Leyland on a monthly basis. No formal written acceptance was necessary to complete an order. Orders phoned in to Leyland representatives or told to said personnel were considered complete upon communication. Trade custom and usage also determined that orders of cars were normally delivered by Leyland to the dealer's place of business.

The Rover was first marketed in this country in approximately 1963. In 1968, British Leyland decided to introduce a new Rover sedan into the United States market.

There was virtually no market for Rovers in the United States among the motoring public and dealers generally resisted purchasing Rovers from Leyland.

In order to promote the sale of this automobile and other model Rover automobiles, British Leyland determined to use its leverage over the strong national Triumph dealer network. It did this by conditioning the sale of Triumph automobiles to Triumph dealers on the purchase by those dealers of Rover automobiles.

Leyland also had other dealership networks other than Triumph for the sale of its Jaguar, Austin and MG make automobiles including a separate national Rover dealership network.

Nevertheless beginning in 1968 and continuing through 1970, Leyland, as a matter of policy and practice, deliberately withheld and delayed deliveries and otherwise made less cars available to Triumph dealers who did not purchase Rovers. At the same time, Leyland, however, made more Triumphs available on preferential delivery schedules to dealers who cooperated in their scheme to market Rovers.

Further, Leyland threatened Triumph dealers who would not accede to its demands to market Rovers with nonrenewal of their franchise agreements.

In addition to the Triumph dealership, McGeorge was also a Mercedes Benz dealer of long standing. Mercedes automobiles competed with Rovers. McGeorge thus declined to accede to Leyland's coercive attempts to force him to purchase Rover automobiles and to therefore place him in a position of having to compete directly with himself for the sale of cars in a single facility.

McGeorge was one of a number of dealers nationally who found themselves in a similar position, i.e. being coerced by Leyland to purchase Rover automobiles as a condition to being able to purchase Triumph automobiles and as a condition to retaining their franchises.

All Triumph dealers throughout the United States who like McGeorge refused to accede to Leyland's pressures, were first discriminated against in regard to the delivery of Triumph automobiles and eventually their franchises were terminated or not renewed. By 1970, Leyland had succeeded in forcing all its Triumph dealers to purchase Rover automobiles as a condition of their Triumph purchases. Dealers who failed to do so were terminated or not renewed and replaced by cooperative dealers.

During 1969 and continuing through and up to July, 1970, McGeorge was consistently informed by Leyland that if he continued to resist Leyland's scheme, McGeorge's Triumph franchise would not be renewed. In July, 1970, when McGeorge's Triumph franchise expired, it was formally told by Leyland that its franchise would not be renewed solely because of its failure to purchase Rover automobiles.

However, the decision not to renew was made in May, 1970, when it became clear to Leyland that McGeorge would not cooperate in this regard. Leyland's sole reason for refusal to renew was its decision to obtain a Richmond area dealer which would handle all three (Triumph, Rover and Land Rover) lines—i.e. one who would accept Rovers as an absolute precondition to his Triumph purchases.

During the period in which Leyland first decided to pressure its Triumph dealers into purchasing and selling Rover automobiles until McGeorge's Triumph dealership was not renewed, Leyland sold 8,981 Rover automobiles nationally. The average selling price of these automobiles was $5,500. The total volume of national sales of Rover automobiles involved in Leyland's scheme was approximately $49,395,500.00.

In summary, Leyland (1) attempted to coerce Petitioner into purchasing Rover automobiles by first discriminating in its deliveries of Triumphs prior to the expiration date of the franchise agreement; and (2) when such discriminatory treatment failed, Leyland threatened to and eventually did refuse to renew McGeorge's Triumph franchise agreement for the sole reason that McGeorge refused to purchase Rover automobiles.

REASONS FOR GRANTING WRIT

(I)

THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AS TO THE PROPER INTERPRETATION OF THE AUTOMOBILE DEALERS DAY IN COURT ACT.

The decision of the Fourth Circuit is in direct conflict with the decision of the Second Circuit in *Autowest, Inc.* v. *Peugeot, Inc.*, 434 F.2d 556 (2d Cir. 1970), and the Tenth Circuit in *American Motor Sales Corporation* v. *L. G. Semke*, 384 F.2d 192 (10th Cir. 1967).

In addition, this decision wholly emasculates the Congressional intent and effectiveness of the Act.

Cases under the Act have proliferated within the District Courts and more recently in the Circuit Courts. Yet, since the Act was enacted in 1956, there has been no Supreme Court decision regarding this legislation.

Given the present state of the economy, many new Act cases reasonably can be expected to be filed in the Federal Courts. A definitive Supreme Court decision at this time would have a positive effect on the number and kind of cases which will be filed under the Act and would give needed guidance to the Courts already

considering such cases faced with conflicting Circuit decisions.

One of the primary abuses at which the Act was aimed was failure to renew dealership franchises. It provides that the manufacturer must act in good faith in renewing a franchise with a dealer. Good faith is defined as a duty to guarantee the one party freedom from coercion, intimidation or threats of coercion and intimidation from the other party. Congress deliberately determined and the Act specifically contemplates that a dealer could not and cannot be denied renewal because he refuses to succumb to manufacturer coercion and intimidation.

Until the decision in this case, neither "rational business decision," "sound business considerations," nor "best interests of the manufacturer" have been allowed as justifications under the Act. They have not only been excluded by Congress as defenses, but no other Circuit has allowed them as defenses under the Act. The test in each Circuit until now has focused on coercion and intimidation regardless of the alleged business justification the factory might have for such coercion or intimidation.

The irony is that the coercion involved was upheld by the Court below as constituting a violation of the Act for the number of Triumph vehicles which McGeorge was shorted prior to the non-renewal of the franchise. The coercion, therefore, was acknowledged and sustained a Cause of Action under the Act to that extent.

Although that same coercion was the sole cause of the non-renewal, the Court below refused to allow damages for the non-renewal because it found a ra-

tional business decision for that coercion and intimidation.

The Fourth Circuit therefore, has upheld a ruling that "the refusal to renew was based upon a rational business decision," and stated it was in the best interest of Leyland to market its Triumph and Rover lines in the United States through its Triumph dealerships. It, in fact, has substituted a rational business decision test for the coercion and intimidation test set forth in the Act.

The Second Circuit in *Autowest, supra*, dealt with this argument directly. There, the Court broke down the kind of conditions to which bad faith may attach, stating them to be, "those which benefit solely or primarily the manufacturer, such as requirements that the dealer purchase a large stock of vehicles."

In regard to the conditions to which bad faith may not attach, the Second Circuit set forth "requirements that worked to the mutual advantage of both parties, for example, that the dealer improve his service."

In this case, it is undisputed that the coercion and intimidation admittedly used by Leyland benefited only Leyland—there being practically no retail market for Rover automobiles. Leyland, in fact, forced its Triumph dealers to buy its dogs if they wished to keep their Triumph franchises.

From the point of view of Leyland, this was undoubtedly a rational business decision. From the point of view of McGeorge, it undoubtedly was not.

Indeed, a manufacturer almost always has a "rational business decision" for coercive practices. The legislative history of the Act indicates that forcing dealers to take unwanted models was one of the primary concerns of the Act.

Simply, this is why the Congress intended and all Circuits to date—except for the Fourth Circuit—have interpreted the Act as meaning precisely what it says—the dealer is entitled to protection from coercion and intimidation no matter what the business reasons of a manufacturer.

Therefore, this decision has written a defense into the Act which is totally inconsistent with decisions in *other circuits*, the plain words of the statute and with the clear intention of Congress.

To allow this decision to stand will be to introduce a serious element of confusion and uncertainty into the law where it previously did not exist and in a legal area in which substantial numbers of cases are now pending in the Federal Courts and where many others may be filed.

The Fourth Circuit Opinion by condoning coercion and intimidation so long as the manufacturer has a self-serving, unilateral "rational business decision" for so doing, in fact, has sounded the death knell of the Act in the Fourth Circuit and in other District Courts and Circuits which might follow its lead.

These conflicts and the importance of the issue justify the granting of certiorari to review the judgment below.

(II)

THE DECISION BELOW RAISES ISSUES WHICH REQUIRE THE EXERCISE OF SUPREME COURT SUPERVISORY POWERS.

In regard to the Robinson-Patman question, the Fourth Circuit reversed the decision of the Trial Court, not on the law, but solely by disregarding the Trial Court's findings of fact and in making its own findings of fact directly contradictory thereto.

The issue involved the seminal decision of the Seventh Circuit in *Contex-Winston Corporation* v. *Edward Hines Lumber Co.*, 447 F.2d 585 (7th Cir. 1971) *cert. denied* 405 U.S. 921 (1972).

In *Contex-Winston* the Court specifically held that discriminations in delivery services are actionable under Section 2(e) of the Clayton Act as amended. It is unquestioned here that such discriminations did exist and indeed, they were the basis for the damages upheld by the Fourth Circuit under the Dealers Day-In-Court Act for withholding and delaying deliveries of Triumphs prior to the failure to renew the franchise agreement.

The Fourth Circuit indicated some disagreement with the Seventh Circuit decision but refused to meet the issue head on. Indeed, at least one District Court within the Fourth Circuit has specifically declined to follow the *Contex-Winston* decision. See, *Corley Motor Co., Inc.* v. *General Motors Corp.*, 380 F.Supp. 819 (D.C. Tenn. 1974).

The Fourth Circuit determined that:

> "Unlike *Contex-Winston* in which the defendant contracted to deliver the commodities, the dealership agreement involved here required McGeorge to accept delivery of Triumphs at their point of arrival in Baltimore or engage independent transporters at its own risk. The record reveals that McGeorge frequently sent individual employees to Baltimore for the express purpose of driving new cars back to Richmond. The district court's reliance on *Contex-Winston* was thus misplaced."

This finding is directly contrary to the finding of the Trial Court. That Court found as a matter of fact

that trade custom and usage was that orders of cars from Leyland were normally and in the usual course of business delivered by Leyland to the dealer's place of business and that individual trips by McGeorge employees were the rare exception, not the rule. Indeed, every Triumph vehicle which was the subject of the Trial Court's findings under the Dealers Day In Court Act was in fact delivered by Leyland from the Port of Baltimore to the dealer's place of business.

The Trial Court, as a matter of fact, found that

> "Leyland's sole function was to distribute all the cars produced by British Leyland. A major service inherent in this function is delivery of cars from the docks on import."

It is basic law that an appeals court cannot substitute its judgment of the facts for those of the court below. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605 (1950); *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485 (1950); *United States* v. *Yellow Cab Co.*, 338 U.S. 338 (1949); and *Cleo Syrup Corp.* v. *Coca-Cola Co.*, 139 F.2d 416 (8th Cir. 1943), *cert. den'd* 321 U.S. 781 (1944). Yet, this is precisely what the Fourth Circuit has done. It has dodged the legal issue by making a factual finding that directly contradicts the finding of the Trier of the Facts. Indeed, there has been an increasing tendency by Circuit Courts to do this in other cases including those rising under the Dealers Day In Court Act. See *Rea* v. *Ford Motor Co.*, 497 F.2d 577 (CA-3 1974).

The same procedure was followed by the Fourth Circuit in the calculation of damages. The Trial Court on the basis of the evidence before it found that Mc-

George had been shorted 55 cars as a matter of fact. The Fourth Circuit has substituted for that factual finding—36 cars. There is no basis in the record for such a finding. That information was taken from Respondents' Brief where it was advanced for the first time, that issue never having been raised at the Trial Court level. Nor had Petitioner any opportunity to refute the theories and facts contained in Respondents' Brief prior to appeal. It has long been the rule that factual allegations may not be raised for the first time on appeal. See, *New Haven Inclusion Cases*, 399 U.S. 392 (1970) and *Bradley G. Schley v. Pullman's Palace Car Company*, 120 U.S. 575 (1887).

Therefore, a Writ of Certiorari should issue so that this Court under its supervisory powers can reassert two basic doctrines which have been totally ignored by the Fourth Circuit and conflict with Supreme Court Opinions—the Appeals Court cannot substitute its factual findings for that of the Trial Court unless such findings are "clearly erroneous" and factual allegations may not be raised for the first time on appeal.

THE 4TH CIRCUIT OPINION DIRECTLY CONFLICTS WITH SUPREME COURT DECISIONS REGARDING STANDARDS OF LIABILITY IN TIE-IN CASES UNDER SECTION 1 OF THE SHERMAN ACT AND SECTION 3 OF THE CLAYTON ACT.

The 4th Circuit has rejected *per se* standards for determining tie-in liability as set forth in definitive Supreme Court decisions. Also, it has disregarded and failed to distinguish the elements necessary for a completed Sherman Act Section 1 offense and those necessary for a nascent Section 3, Clayton Act offense which requires only a reasonable probability of injury.

It was uncontested that McGeorge's franchise was terminated because he refused to accede to a tie-in scheme. As a condition of having his Triumph franchise renewed, he had to agree to purchase also Rover motor vehicles.

The law is clear that a refusal to deal, when utilized in furtherance of a scheme to enforce a tie-in arrangement is unlawful. See *Osborn* v. *Sinclair Refining Co.*, 324 F.2d. 566 (4th Cir. 1963), *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964) and *Fontana Aviation, Inc.* v. *Beech Aircraft Corporation*, 432 F.2d 1080 (7th Cir. 1970).

The question then is whether the tie-in scheme involved was an unlawful one. In regard to Section 3 of the Clayton Act, this Court has held:

> "When the seller enjoys a monopolistic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the 'tied' product is restrained, a tying arrangement violates the . . . standards expressed in §3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred." *Times-Picayune Publishing Company* v. *United States*, 345 U.S. 594 at 608, 609 (1953). Emphasis ours.

In regard to Section 1 Sherman Act cases, the definitive opinion is *Fortner Enterprises* v. *United States Steel Corp.*, 394 U.S. 495 (1969). There, the Court stated that both of the above tests must be satisfied in order to establish a *per se* violation. The Court refined the market dominance standard and held that the requisite appreciable restraint results whenever a seller can exert some power over some of the buyers in the market, even if his power is not complete over them and over all other buyers in the market.

Accordingly, this Court stated in *Fortner* that the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as tie-in, with respect to any appreciable number of buyers within the market.

In a Section 3 case where either test is met a *per se* violation arises and injury to competition is conclusively presumed. In a Sherman Act case where both conditions are met, a *per se* violation follows.

The trial court in its original Opinion in Footnote 7 stated:

> "The Court is aware that authorities have differed on whether market share should be calculated quantitatively, in dollars, or qualitatively, in percentages. In *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495 (1969), e.g., $200,000 was held not insubstantial. *Int'l Salt v. United States*, 332 U.S. 392 (1947) offers the now well cited $500,000 standard. *Both figures are exceeded here.* The Court nevertheless concludes that a qualitative analysis is just here. The marginal nature of Rover business domestically, borne out by termination of Rover imports in 1971, prompts the Court to that conclusion." Emphasis ours.

In its Supplemental Opinion of April 10, the Court stated:

> "The Court has found that the tying arrangement complained of is both in effect and in scope *de minimis*. In this context, the Court concluded that McGeorge failed to prove either that Leyland had a dominant position in the tying market (Triumph's market) by which it could effect the tying arrangement on a broad scale or that a 'not insubstantial' amount of competition in the tied product (Rover) had been forestalled. Proof of either would demonstrate an illegal tie-in *per se* under Clayton Act § 3. *Advance Business Systems*

> v. *SCM*, 415 F.2d 55 (4th Cir. 1969). Plaintiff here contests both conclusions as well as the Court's application of a qualitative substantiality test to the latter requirement. In this respect plaintiff's position may be well taken, but in view of another problem is academic."

That additional problem to which the Court referred and upon which it relied in denying recovery in the Court's words is the:

> ". . . so-called 'Exclusionary Condition,' by which is meant that as an element of the challenged arrangement the 'victim,' for want of a better term, is forced to forego the use or purchase of competitive products."

There is nothing in either the *Fortner* or *Times-Picayune* decisions, *supra*, which sets forth a requirement of an exclusionary condition as a condition to a *per se* violation. In fact, a *per se* violation would in and of itself preclude the necessity of showing an exclusionary condition even if it were a necessary element of a tie-in—which it is not. The cases cited by the Court were, in fact, exclusive dealing cases under Section 3 of the Clayton Act rather than tie-in cases.

The 4th Circuit stated:

> "The district judge rejected this contention of McGeorge primarily upon his finding that Leyland's conduct did not impede or suppress competition nor did the proposed arrangement preclude McGeorge from continuing its representation of Mercedes-Benz or other motor cars competitive with Rover. We agree with this conclusion of the district court."

This is directly contrary to the standards set forth by the Supreme Court in the above cases that once the standards of *per se* illegality are met, no showing of

actual injury to competition is necessary. What the 4th Cuit has in fact done is to write out of tie-in cases Supreme Court standards of *per se* liability by requiring that the plaintiff present proofs in all cases of rule of reason standards even where *per se* standards have been met.

The 4th Circuit has ruled, that in a tie-in case a plaintiff must meet both rule of reason standards and *per se* standards. This decision is in direct conflict with both *Times-Picayune* and *Fortner*.

The Writ of Certiorari should be granted in this case so that at a minimum, the 4th Circuit Court can make a decision pursuant to the *per se* standards established by the Supreme Court, rather than the rule of reason standards which they have engrafted on *Fortner* and *Times-Picayune*.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the 4th Circuit.

Respectfully submitted.

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OPINION OF THE FOURTH CIRCUIT

504 F.2d 52 (1974)

(Entered October 1, 1974)

DAVID R. McGEORGE CAR CO., INC., *Appellee*,

v.

LEYLAND MOTOR SALES, INC., *Appellant*.

DAVID R. McGEORGE CAR CO., INC., *Appellant*,

v.

LEYLAND MOTOR SALES, INC., *Appellee*.

Nos. 73-2114, 73-2115.

United States Court of Appeals, Fourth Circuit.

Argued Feb. 7, 1974.

Decided Oct. 1, 1974.

FIELD, Circuit Judge:

David R. McGeorge Car Co., Inc., (McGeorge) brought this action against Leyland Motor Sales, Inc., (Leyland) and its parent corporation, British Leyland Motors, Inc.,[1] alleging that an arrangement in the sale of automobiles constituted bad faith dealing in violation of the Dealers Day in Court Act (DDICA), 15 U.S.C. § 1222, and was also in violation of federal antitrust statutes. The district court awarded relief under the DDICA and the Robinson-Patman Act for Leyland's deliberate shortage of one line of automobiles to McGeorge in an attempt to coerce its acceptance of additional lines. However, the district court refused to grant relief under either the DDICA or the antitrust acts for British Leyland's refusal to renew Mc-

[1] British Leyland Motors, Inc., the parent corporation, was subsequently dismissed as a party defendant.

George's dealership, after the latter had declined the additional lines of automobiles. Both parties have appealed.

David R. McGeorge Car Co., Inc., was founded in 1960 by David R. McGeorge who managed the company until an illness in February of 1970 when his son Robert assumed control. Throughout the 1960's McGeorge sold three lines of automobiles, Mercedes-Benz from 1960 on, Triumph from 1963 to mid-1970, and Toyota continuously from 1968. None of the cars was competitive with the other since Mercedes-Benz sold for approximately $6,000, Triumph for $2800 and Toyota for $2,000. McGeorge's dealership agreement for the sale of Triumphs, signed originally with the Standard Triumph Motor Company in 1963, was renewed for two years in July, 1968, with Leyland Motor Sales, Inc., the northeast regional distributor for British Leyland Motors, Inc., which had acquired the Standard Triumph Motor Company.

In addition to its acquisition of Triumph, in April of 1967 British Leyland purchased The Rover Company, Ltd., manufacturers of Land Rover, a cross-country vehicle, and Rover, a luxury sedan in the Mercedes and BMW class. Shortly thereafter British Leyland initiated a policy designed to couple the high consumer appeal of Triumph with its newly acquired Rover and Triumph dealers throughout the United States were presented with a proposal that in order to continue selling Triumphs they should begin selling Rovers and Land Rovers. At the time of the proposal, Triumphs, already in high demand, began experiencing shortages as a result of labor problems in England. British Leyland was then in the position of allocating an item in high demand and short supply among dealers who had been presented with British Leyland's offer of Rover and Land Rover. McGeorge declined the proposal based upon its assessment that Rover had little sales potential and the fact that Rover would compete with Mercedes-Benz which it was already selling.

In October 1969, Leyland Motor Sales, Inc., began cutting McGeorge's supply of Triumphs in an attempt to persuade it to reconsider the Rover and Land Rover proposal. Whereas the supply of Triumphs was off 10 to 20 percent nationally in 1969, McGeorge's supply was cut by 50 percent in that year and an additional 16 percent in 1970. Conversely, other Virginia Triumph dealers who had accepted Rover and Land Rover experienced only a 25 percent cutback in 1969 and increases of up to 93 percent in 1970. When in May of 1970 it became clear that McGeorge's rejection of Rover and Land Rover was final, Leyland Motor Sales, Inc., recommended to British Leyland that McGeorge's Triumph dealership not be renewed upon its normal expiration in July, 1970. The dealership was not renewed and in September of 1970 David R. McGeorge brought this action.

I

In awarding McGeorge relief under the Robinson-Patman Act the district court, relying on *Contex-Winston Corp.* v. *Edward Hines Lumber Co.*, 447 F.2d 585 (7 Cir. 1971), held that Leyland's "delivery" of a short supply of Triumphs to McGeorge was a discriminatory allocation of services proscribed by § 2(e) of the Act[2] which provides that

> (e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, *any services or facilities* connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms. (Emphasis added).

[2] 15 U.S.C. § 13(e).

In *Centex-Winston*, the Seventh Circuit held that a wholesaler's delivery of lumber to a builder consistently later than contractually specified dates, while delivering lumber orders of the builder's competitors on time, was discrimination among purchasers in the furnishing of a service, i.e., delivery connected with the resale of a commodity.

[1] We are unable to agree with the conclusion of the district court for even if we were to accept the Seventh Circuit's characterization of delivery as a "service,"[3] factual distinctions in the present case render *Centex-Winston* inapposite. Unlike *Centex-Winston* in which the defendant contracted to deliver the commodities, the dealership agreement involved here required McGeorge to accept delivery of Triumphs at their point of arrival in Baltimore or engage independent transporters at its own risk. The record reveals that McGeorge frequently sent individual employees to Baltimore for the express purpose of driving new cars back to Richmond. The district court's reliance on *Centex-Winston* was thus misplaced. That Leyland was discriminating in the allocation of Triumphs, the commodity itself, as opposed to a service or facility connected with the resale of the commodity is obvious, and in our opinion places this case beyond the pale of Robinson-Patman. We conclude that Robinson-Patman was an improper basis for the judgment below.

II

[2-4] We do agree with the district court that Leyland's conduct in "shorting" McGeorge in the delivery of Triumphs in an attempt to compel it to accept the Rover and Land Rover lines constituted a lack of good faith on

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[3] For the contrary view see Rowe, Pricing and the Robinson-Patman Act, 41 Antitrust L.J. 98, 109 (1972).

its part under the Dealers Day in Court Act.[4] The DDICA, which has been described as "a fringe area of antitrust law * * * designed in part to supplement [those] laws,"[5] requires the manufacturer to act in good faith in carrying out the provisions of the franchise as well as in its termination, cancellation or non-renewal. Good faith, which is defined in Section 1(e) of the Act,[6] has been construed literally by the courts and must be determined in the context of actual or threatened coercion or intimidation, *Lawrence Chrysler Plymouth, Inc.* v. *Chrysler Corp.*, 461 F.2d 608 (7 Cir. 1972); *American Motor Sales Corporation* v.

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[4] § 1222. Authorization of suits against manufacturers; amount of recovery; defenses

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided*, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith. Aug. 8, 1956, c. 1038, § 2, 70 Stat. 1125; 15 U.S.C. § 1222.

[5] *Autowest, Inc.* v. *Peugeot, Inc.*, 434 F.2d 556, 561 (2 Cir. 1970).

[6] § 1221. *Definitions*

As used in this chapter—

* * * * *

(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith. Aug. 8, 1956, c. 1038, § 1, 70 Stat. 1125; 15 U.S.C. § 1221(e).

Semke, 384 F.2d 192 (10 Cir. 1967), and it now appears to be settled that a manufacturer's coercive attempt to force unwanted automobiles on a dealer constitutes bad faith dealing for purposes of the Act. *American Motor Sales* v. *Semke*, *supra*, and *see* House Report No. 2850, 84th Cong. 2d Sess. 9, 3 U.S.Code Cong. & Admin.News, pp. 4596, 4603 (1956).[7] We think it reasonable to read into McGeorge's dealership agreement an implied provision that in the event of a strike or casualty occasioning a reduction in the number of Triumphs exported to this Country the manufacturer would treat its dealers ratably and equitably. The district court's finding of coercion in the cutback of Triumphs is fully supported by the evidence, and the DDICA gives McGeorge a remedy for the loss of profits suffered by it as a result of this discriminatory action taken by Leyland in an effort to compel McGeorge to make a concession which was not required of it under the terms of its dealership.

[5] The more troublesome question on this aspect of this appeal is whether the district court was correct in holding that the non-renewal of McGeorge's dealership did not also constitute bad faith dealing under the Act. The district court concluded that Leyland's decision not to renew was made after the failure of coercive measures and not as a continuing part thereof, and that although Leyland had acted in bad faith with respect to the shortages, the refusal to renew was based upon a rational business decision. We are inclined to agree with this conclusion. The evidence clearly demonstrates that it was in the best interests of Leyland to market its Triumph and Rover lines

[7] "The existence of coercion or intimidation depends upon the circumstances arising in each particular case and may be inferred from a course of conduct. For example, manufacturer pressure, direct or indirect, upon a dealer to accept automobiles, parts, accessories, or supplies which the dealer does not need, want, or feel the market is able to absorb, may in appropriate instances constitute coercion or intimidation.

in the United States through dual dealerships and, indeed, that such dual dealerships were its only hope of improving the rather disappointing market performance of the Rovers. When McGeorge declined to accept such a dual dealership Leyland had a perfectly legitimate reason to refuse to renew its Triumph franchise. With no further contractual obligation to McGeorge, Leyland's decision to obtain a dealer who would carry out its marketing policy with respect to both Triumphs and Rovers was based on sound business considerations free from the "coercion or intimidation" proscribed by the Act.

[6] The plaintiff contends, however, that Leyland's conduct in its efforts to coerce McGeorge in the 1969-70 period fatally infected its 1970 decision to transfer the dual line to another dealer. To accept this charge of continuing bad faith, however, would permanently preclude Leyland from making any change in its marketing procedures at any time in the future and, in effect, the bond between dealer and manufacturer would be indissoluble. "A franchise is not a marriage for life,"[8] and the Act does not prohibit the manufacturer from terminating or refusing to renew the franchise of a dealer who is not providing the manufacturer with adequate representation or who refuses to carry out its legitimate marketing policies. "Nor does the [Act] curtail the manufacturer's right to cancel or not renew an inefficient or undesirable dealer's franchise."[9] It has been held that under the Act a manufacturer is not precluded from terminating or refusing to renew the franchise of a dealership which has not provided adequate sales representatives,[10] adequate facilities

[8] *Bateman* v. *Ford Motor Company*, 302 F.2d 63, 66 (3 Cir. 1962).

[9] H.R.Rep. No. 2850, 84th Cong.2d Sess. 9, U.S.Code Cong. & Admin.News, pp. 4596, 4603 (1956).

[10] *Garvin* v. *American Motor Sales Corporation*, 318 F.2d 518 (3 Cir. 1963); *Woodward* v. *General Motors Corporation*, 298 F.2d 121 (5 Cir. 1962).

for the conduct of the dealership,[11] or does not meet reasonable sales objectives.[12] We discern no significant difference between those cases and the present one where the evidence supports the conclusion that Leyland acted in the reasonable belief that its business welfare required a dual dealership arrangement.[13]

III

On its cross-appeal McGeorge contends that the shortage in the delivery of Triumphs and the subsequent refusal by Leyland to renew its dealership were merely progressive stages in a scheme to enforce a tie-in of Triumphs and Rovers, and that Leyland's conduct in this respect violated both Section 3 of the Clayton Act [14] and Section 1 of the Sherman Act [15] under the *per se* doctrine of *International Salt Co. v. United States*, 332 U.S. 392, 68 S.Ct. 12, 92

[11] *Milos v. Ford Motor Company*, 317 F.2d 712 (3 Cir. 1963); *Staten Island Motors, Inc. v. American Motors Sales Corp.*, 169 F.Supp. 378 (D.N.J.1959).

[12] *Frank Chevrolet Co. v. General Motors Corp.*, 419 F.2d 1054 (6 Cir. 1969).

[13] While the district judge found that McGeorge had not acted in bad faith, we note that business expediency in its relations with both Mercedes and Toyota influenced McGeorge to a large degree in its refusal to accept the dual dealership. Robert McGeorge testified that in the year 1969 his company sold 119 Mercedes, 246 Toyotas and 77 Triumphs. He further testified that his father, David McGeorge, had told him that he had spoken to Mercedes-Benz representatives about taking on Rover and that they "frowned" on it and that he felt "they would lift the franchise." The record further indicates that Toyota was pressing McGeorge to eliminate Triumphs and continue only with Toyota and Mercedes. This possibility played a significant part in Leyland's decision to seek another dealer who could guarantee more permanency.

[14] 15 U.S.C. § 14.

[15] 15 U.S.C. § 1.

L.Ed. 20 (1947). The district judge rejected this contention of McGeorge primarily upon his finding that Leyland's conduct did not impede or suppress competition nor did the proposed arrangement preclude McGeorge from continuing its representation of Mercedes-Benz or other motor cars competitive with Rover. We agree with this conclusion of the district court.

[7, 8] The "perceptible pattern of illegality" in "tying cases" was stated in *Times-Picayune* v. *United States*, 345 U.S. 594, 608-609, 73 S.Ct. 872, 880, 97 L.Ed. 1277 (1953):

> "When the seller enjoys a monopolistic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the 'tied' product is restained, a tying arrangement violates the narrower standards expressed in § 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred. And because for even a lawful monopolist it is 'unreasonable, *per se*, to foreclose competitors from any substantial market', a tying arrangement is banned by § 1 of the Sherman Act whenever *both* conditions are met."
>
> (Emphasis in original.)

Following this delineation of the hallmarks of illegality, however, the court made it clear that it is the resultant foreclosure of competition which offends the antitrust statutes. "The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market." *Id.* at 614, 73 S.Ct. at 883. The address of the statutes to the anti-competitive effect of such an arrangement was emphasized by Mr. Justice Harlan in his dissenting opinion in *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 14, 78 S.Ct. 514, 522, 2 L.Ed.2d 545 (1958):

> "It is not, as the Court intimates at one point in its opinion, that under the Sherman Act the tying clause

> is illegal *per se*; the *per se* illegality results from its use by virtue of a vendor's dominance over the tying interest to foreclose competitors from a substantial market in the tied interest."

Similarly, the decisions in our circuit have focused upon the competitive effect of the suspect conduct. In *McElhenney Co.* v. *Western Auto Supply Company*, 269 F.2d 332, 338-339 (4 Cir. 1959), Judge Sobeloff stated that

> "The gravamen of a Section 3 violation is the forbidden condition, agreement or understanding of exclusivity, and a proper pleading should assert this ultimate fact. It makes no difference whether this is voluntary or is imposed by coercion, but without such agreement, condition or understanding, there can be no statutory infraction. It is only in the presence of this essential element that consideration must be given as to whether competition may be substantially lessened or whether there is any tendency toward monopoly."

And in the later case of *Advance Business Systems & Supply Co.* v. *SCM Corporation*, 415 F.2d 55, 60 (4 Cir. 1969), Judge Sobeloff pointed out the manner in which competition is curbed by an illegal tie-in:

> "First, the buyer is prevented from seeking alternative sources of supply for the tied product; second, competing suppliers of the tied product are foreclosed from that part of the market which is subject to the tying arrangement."

The language in these decisions accords with the rationale of two classic cases in this area, *Fed. Trade Comm.* v. *Sinclair Co.*, 261 U.S. 463, 43 S.Ct. 450, 67 L.Ed. 746 (1923), and *United Shoe Mach. Co.* v. *United States*, 258 U.S. 451, 42 S.Ct. 363, 66 L.Ed. 708 (1922), that the vice of an illegal tie-in is the fact that the agreement or the effect thereof lessens competition in the tied product. We agree with the district judge that the dual dealership proposed by Leyland does not fall within that classification of arrangements which have no lawful business objective and "serve hardly any purpose beyond the suppression of competi-

tion."[16] The record supports the finding that Leyland's conduct did not impede nor tend to impede competition between Rover and other motor cars in its style and price range, and it is this fact which clearly distinguishes the case before us from the tie-ins which were condemned by the Court in *Fortner Enterprises* v. *United States Steel*, 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969); *Northern Pac. R. Co.* v. *United States*, *supra*; and *International Salt Co.* v. *United States*, *supra*.

IV

[9] In granting McGeorge relief under the Robinson-Patman Act the district court, acting pursuant to Section 4 of the Clayton Act,[17] entered orders awarding treble damages in the amount of $109,176 and attorney's fees in the amount of $25,700. Since we conclude that McGeorge was not entitled to relief under the antitrust laws, this award of treble damages as well as attorney's fees was, of course, improper.

[10] In his initial computation of damages the district judge proceeded on the assumption that McGeorge should have received an additional 14 cars in the fall of 1969 and an additional 52 cars for the first seven months of 1970, or a total of 66 vehicles. Multiplying 66 by a gross profits factor of $708 per car, less certain adjustments, the court arrived at basic damages in the amount of $36,392. While the record supports the gross profits factor adopted by the district court, we agree with the defendant that the projected shortage of 52 cars in McGeorge's "allocation" for the first seven months of 1970 was erroneous.

In arriving at this projection the court accepted the formula propounded by the plaintiff's expert that 1967-68 sales of Triumphs to McGeorge amounted to 87 percent of the combined total of cars sold to three other designated

[16] *Standard Oil Co.* v. *United States*, 337 U.S. 293, 305-306, 69 S.Ct. 1051, 1058, 93 L.Ed. 1371 (1949).

[17] 15 U.S.C. § 15.

dealers, and the application of this percentage to the units supplied to the same three dealers in 1970 gave McGeorge a projected allocation of 83 cars for that period. Since McGeorge, in fact, received only 31 cars during the period, the court concluded that it had been shorted 52 units. In our opinion the basic percentage should have been McGeorge's share of the aggregate of the vehicles supplied to McGeorge as well as the three other designated dealers in 1967-68. This would result in a projected allocation to McGeorge of 47 percent, and when this is applied to the 126 units available and delivered to the same four dealers during the first seven months of 1970, McGeorge would be entitled to 59 cars, with a resultant shortage of 28 instead of the 52 found by the district court. Accordingly, the judgment of the district court will be set aside and the case remanded for the assessment of damages only under the DDICA, and in assessing these damages the district court shall apply the formula to a projected shortage of 14 cars in the fall of 1969 and 28 cars in the first seven months of 1970.

[Caption Omitted in Printing]

ORDER DENYING REHEARING

[Filed October 30, 1974]

Upon consideration of the MOTION FOR RECONSIDERATION AND SUGGESTION FOR REHEARING EN BANC filed on October 18, 1974, by David R. McGeorge Car Co., Inc.,

NOW, THEREFORE, with the concurrence and approval of the other members of the panel and in the absence of a request for a poll of the entire court, as provided by Appellate Rule 35(b),

It is ADJUDGED and ORDERED that the Motion for Reconsideration is denied.

/s/ JOHN A. SIMS, JR.
United States Circuit Judge

MEMORANDUM OPINION AND ORDER OF JANUARY 9, 1973

[Filed January 9, 1973]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

CIVIL ACTION NO. 346-71-R

DAVID R. MCGEORGE CAR CO., INC.

v.

BRITISH LEYLAND MOTORS, INC., ET AL.

David R. McGeorge Car Co., Inc. (McGeorge) brought this anti-trust action against British Leyland Motor Corporation, Ltd. (British Leyland), a British auto manufacturer, which subsequently was dismissed as a party defendant, and against its wholly owned domestic subsidiary, British Leyland Motors, Inc. and its wholly owned subsidiary, British Leyland Motor Sales, Inc. (both domestic companies hereinafter collectively referred to as Leyland) for damages accuring from alleged violations of federal anti-trust laws. Jurisdiction is attained by virtue of 15 U.S.C. § 1222 (Dealers' Day in Court Act), as well as 28 U.S.C. §1331 (federal question with respect to federal anti-trust legislation, *infra*) and 28 U.S.C. § 1332 (diversity jurisdiction). The respective parties, by counsel, have appeared before the Court sitting without a jury, for trial of this action, and it is upon same and the evidence adduced thereto that the Court makes its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The great quantity of exhibits and range of testimony submitted to the Court do not belie the fact that there are few, if any, controverted factual issues involved here. In short, McGeorge a foreign car dealer, carried the line of Triumph motorcars, manufactured by British Leyland,

but did not carry two other lines made by British Leyland, Rover and Land Rover. Leyland, in an effort to expand its Rover and Land Rover distribution, sought to have McGeorge take on those lines as well. When McGeorge refused, for reasons discussed *infra*, Leyland cut back McGeorge's allocation of Triumphs, of which at that time there was a general shortage of supply, both to pressure plaintiff to change its mind and to "cultivate" other area dealers who undertook to sell all three lines by supplying them with more Triumphs. That cut back gives rise to McGeorge's first claim. Subsequently, when McGeorge's dealership contract expired, Leyland refused to renew for the stated reason that it preferred an area dealer which would sell all three lines. This refusal to renew gives rise to McGeorge's second claim.

The Court's specific findings follows:

The McGeorge Car Company is a Richmond car dealer which between 1963 and July 1970 sold Triumph automobiles. During that period McGeorge also sold Toyota and Mercedes-Benz autos as well as used cars. Through 1968 McGeorge company was managed and run by its principal owner and president, David McGeorge, who, it is apparent from exhibits before the Court, was regarded by Leyland as a "tough" but good business man. Through 1968 and up to 1970, however, David McGeorge, partially as a result of illness, gradually turned over management responsibility to his son Robert, who Leyland initially regarded as "a good deal for us." (PX 21). Robert McGeorge subsequently became president after his father's death in September 1970, although it is clear he had been the effective manager for most of the period in question (1968-70). Some contention was made at trial that the difficulties between the parties in part stemmed from disaffection with Robert McGeorge's capabilities. There was, however, no evidence introduced in support thereof. The change in command, however, while not relevant to the cut back claim, does bear upon the renewal question.

The evidence before the Court indicates that McGeorge was an excellent Triumph dealer, which fact was admitted in testimony by Leyland's officers. McGeorge sold 72 Triumphs in 1967, 124 in 1968, and in 1969, when the difficulties commenced, 63 Triumphs. McGeorge led all other Virginia dealers during these years. In 1970, prior to termination, McGeorge sold 27 Triumphs.

McGeorge's best seller for these years was, however, Mercedes-Benz (121 units in 1968, 119 units in 1969 and 52 units for eight months of 1970), the sales of which produced the largest gross revenues. McGeorge also sold a sizeable quantity of Toyotas for these years as well (71, 246 and 276, respectively).

The three lines sold by McGeorge were uncompetitive with each other, the average Triumph retailing for $2800-$2900, Toyota about $2000 and Mercedes-Benz $6000 and over. Within the Triumph line, the TR-6 model was the best seller, the popular demand for which was continually in excess of supply.

In 1967, Leyland was faced with a desire to increase Rover and Land Rover sales. At that time the decision was made to induce existing Triumph dealers to take on the latter lines, the hope being to boost Rover distribution on the "coattails" of the popular Triumph. In 1968 McGeorge was approached by Leyland personnel in an effort to get the plaintiff to add these lines. McGeorge resisted, perhaps in part because of a lack in faith in the Rover products,[1] but for the most part because the Rover line would compete with Mercedes. McGeorge's position was further firmed by Mercedes' opposition to the proposal. Leyland's repeated offers in this regard were thus rebuffed by McGeorge.

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[1] The evidence indicates, however, that McGeorge was later willing to set up a Rover-Triumph dealership in a different location, which proposition was rejected by Leyland.

During the 1968-69 fiscal year, Leyland began undergoing a shortage of Triumph imports due to labor strikes in England, domestic dock strikes and production problems. While the exact extent of the shortage is not clear, the evidence indicates that Leyland's shipments were between 80 and 90% of the 1967-68 total. (DX-4 and PX-49) Said shortage was particularly serious with respect to the TR-6 model, which most dealers, including McGeorge, were apparently able to sell as quickly as the cars came in.

McGeorge began feeling the effects of the shortage in October 1969 through July 1970. The evidence is clear, however, that in McGeorge's case the shortage suffered went beyond the extent of the national shortage. The evidence discloses a clear attempt by Leyland to pressure plaintiff into taking on the Rover lines by shorting him, with the promise of "all the Triumphs he could use" as the inducement to cooperate. When it became clear to Leyland that McGeorge would not cooperate, the decision was made by May 1970 not to renew McGeorge's dealership. The deliberate shortage policy was thus continued, by admission of H. F. Fennarty, Leyland's Regional Manager, so that more Triumphs could be diverted to cooperative dealers with whom Leyland thought it had a future. (See also, PX-49).

The extent of the shortage is revealed by the delivery figures. McGeorge's Triumph sales for the years in question are compared in the following table:

City	Dealership	1967	1968	1969	Jan.-July 1970
Charlottesville	Coggins Motors Co.	13	15	12	4
Fredericksburg	Noble Cars (appointed 10/69)			10	51
Woodbridge	Cope Ford	18	28	5	(terminated 10/69)
Norfolk	John Copeland Motors	48	81	61	62
Hampton	Copeland Motor Car Co.	23	45	16	29
Richmond	McGeorge Car Co.	72	124	63	27

McGeorge's deliveries were cut 50% from 1968 to 1969, despite a large increase the year before. The first seven months of 1970, projected to a full year rate, show a further 16% decrease.[2] This may be compared with John Copeland Motors, a dealer in all three Leyland lines, which suffered a 25% decrease from 1968 to 1969, yet gained from 1969 to 1970 at a 93% projected rate on the basis of 12 months. These figures reflect the particularized shortage suffered by McGeorge over the 1969-1970 period. Compared to J. Copeland Motors, the plaintiff suffered a 30% greater decrease in 1969 and a 10% greater decrease in 1970. As can best be estimated, these figures represent a total of approximately 66 cars over that period.[3]

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[2] McGeorge actually received 31 cars, 4 of which were returned after termination. Figures computed on this basis.

[3] The Court adopts the calculations of plaintiff's expert in this regard:

Table 17

Estimation of Damages Resulting from Shortages October 1969, through July 1970.

1. In 1967-68 (the only years of no alleged shortages), McGeorge received on the average 87.1% as many cars as Coggins Motors, Copeland Motor Car Co., and John Copeland Motors (See table *supra*):

$$\frac{72 + 124}{84 + 141} = 87.1\%$$

2. Expected deliveries

1969: $0.871 \times 89 = 77.519 = 77$ cars (we round downward because 1970 is rounded upwards)

1970 (January through July): $0.871 \times 95 = 82.745 = 83$ cars

3. Alleged shortages

1969: $77 - 63 = 14$ cars
1970: $83 - 31 = 52$ cars.

TOTAL 66 cars

As stated above, McGeorge's dealership was not renewed in late summer 1970. The stated reason for said non-renewal, admitted by defendants, was McGeorge's refusal to carry all three lines. Subsequently, another Richmond dealer, Bradley Motors, agreed to take on the lines under Leyland's terms.[4]

Leyland has filed a counterclaim of $4342 against McGeorge for payments owing on spare parts. Crediting unpaid warrantee claims against this total, Leyland alleges an unpaid balance owing of $2417. In response, McGeorge has alleged a recoupment owing of $13,050.11 upon an alleged contractual promise by Leyland to repurchase unused parts upon expiration.

The Court finds McGeorge's contention with respect to repurchase upon expiration to be correct. Section 15 of the Dealer Sales Agreement. Leyland's counterclaim is thus without merit.

The Court finds, however, that there is insufficient proof before it as to the exact amount of spare parts left in plaintiff's possession. The Court must accordingly dismiss McGeorge's contended set off for failure to meet the required burden of proof.

Conclusion of Law

The Court concludes that McGeorge has sustained a cause of action for the shortage, for which recovery may be had, but has not done so for the refusal to renew. The Court's specific conclusions of law for each claim will be considered in turn.

Shortage

Plaintiff has propounded four theories upon which it seeks recovery, to wit:

1. Violation of Dealers' Day-in-Court Act.

[4] Interestingly, Leyland stopped importing Rovers in 1971 because of poor consumer response.

2. Violation of the Clayton Act, § 3, and Sherman Act, § 1 (illegal tie-in and refusal to deal).

3. Violation of the Robinson-Patman Act by virtue of discrimination.

4. Breach of contract.

The Dealers' Day-in-Court Act, 15 U.S.C. § 1222, provides:

> An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided*, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith. Aug. 8, 1956, c. 1038 § 2, 70 Stat. 1125.

Upon its aforesaid findings of fact, the Court concludes that McGeorge has sustained injuries compensable under this section.[3] Leyland's efforts to persuade McGeorge to take on the other lines by holding back cars, and its subsequent continued discrimination against plaintiff after the decision not to renew was made, constitutes bad faith compensable under the Act. See *American Motors Sales Corp.* v. *Semke*, 384 F.2d 192 (10th Cir. 1967); *Junikki Imports* v. *Toyota Motor Co.*, 335 F. Supp. 593 (N.D. Ill. 1971). Nor is there any evidence before the Court that McGeorge acted in bad faith itself, which bad faith would

[3] The parties have stipulated, and the Court concurs, that they are dealer and manufacturer respectively within the meaning of the aforesaid provision.

bar recovery. McGeorge is entitled to recover damages hereunder (see damages discussion, *infra*).

Plaintiff has also proceeded under several interpretations of the Sherman and Clayton Acts, 15 U.S.C. § 1, 15 U.S.C. § 14. One theory, "Refusal to Deal," under the Sherman Act § 1, is not applicable to the shortage question. The cases in that regard are concerned with manufacturers who refuse to sell to a dealer altogether to effect a broad scheme. As plaintiff seems to concede, they are not addressed to the instant issue of delivery discrimination. See, *e.g. Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207 (1958).

The second theory, of alleged "tie-ins," is also more appropriate to the refusal to renew issue. There is no question that Leyland sought a combined dealership arrangement here; the issue, rather, is whether said arrangement was legal under the Clayton Act or violative of it as an illegal tie-in. That question, however, is not appropriate to the instant issue of discrimination under the pre-October 1970 existing contract. See discussion, *infra*.

Plaintiff's third theory of relief relies on the Robinson-Patman Act, 15 U.S.C. § 13(e), which provides:

> (e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any *services or facilities connected with the processing, handling, sale*, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms. (Emphasis added)

The bone of contention here is not whether Leyland has discriminated, but whether said discrimination applied to "services or facilities."

The traditional interpretation of those words is "merchandising facilities." *Skinner* v. *United States, et al.* 233

F.2d 762 (5th Cir. 1956), including, for example, advertising services, promotional cards, demonstrators, etc. See Federal Trade Commission Guide, CCH Trade. Reg. Serv., ¶ 4003, § 240.5(b). See also, *Corn Products Refining Co.* v. *Federal Trade Comm.*, 324 U.S. 726 (1945). There is no indication that this section applies to discrimination in quantitative distribution of merchandise.

McGeorge, however, asserts that the "service" complained of within the meaning of the Act is delivery service, which falls within the structure of the Act. In support of this contention it cites *Centex-Winston Corp.* v. *Edward Hines Lumber Co.*, 477 F.2d 585 (7th Cir. 1970), in which the Court of Appeals for the Seventh Circuit held that the theory therein propounded extends traditional interpretation of the Robinson-Patman Act.

In *Centex-Winston* a Chicago area builder sued a lumber dealer to redress an alleged discriminatory scheme of consistently delivering lumber to plaintiff behind contractual schedules while delivering it to plaintiff's competitors in preference to the plaintiff. Relying on the spirit and intent of the Act, the Court construed said alleged discrimination as a valid claim for relief under the Robinson-Patman Act, refusing to read the term "services" in the traditional and narrow merchandizing sense. *Centex-Winston* and the instant matter can only be distinguished, if at all, on the basis of the contractual relationship between the parties: in *Centex-Winston*, deliveries were specified as to date and amount by contract; in the present case, Leyland's obligation and contract was to fill orders as quickly as possible once accepted.

The Court, nevertheless, finds this distinction dubious. Leyland's sole function was to distribute autocars produced by British Leyland. A major service inherent in this function is delivery of cars from the docks upon import. The rationale of *Centex-Winston*, which this Court accepts and adopts as a proper implementation of the spirit of the Robinson-Patman Act, is appropriate here.

The Court has found, *supra*, that Leyland favored John Copeland Motors and, in the process of shorting plaintiff, discriminated against it thereby. On the basis of the rule of *Centex-Winston*, the Court concludes that said discrimination constitutes a violation of the Robinson-Patman Act. The significance to plaintiff of the Court's further finding of a violation of this section is limited, however, in that recovery of treble damages is not recoverable under that section. *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373 (1958); *Englander Motors* v. *Ford Motor Co.*, 293 F.2d 802 (6th Cir. 1961).

Plaintiff's fourth theory relies on breach of contract. The gravamen of this contention is that under the dealership contract McGeorge was obligated to use its best efforts to purchase and sell 125 Triumph cars per year, and that said obligation implies a duty by Leyland to use its good faith efforts to supply same. The Court concludes this argument to be without merit. The purpose of this portion of the contract is to set forth a sales goal. The parties are not bound to same. To read an obligation of good faith into this portion beyond that imposed by normal canons of contract law and the Dealers' Day-in-Court Act would stretch the point. The Court need not pursue this claim further, however; for any liability for breach of good faith by Leyland has heretofore been discussed with reference to the Dealers' Day-in-Court Act.

The final question with regard to liability for shortage concerns which of the defendants is in fact responsible.

The Court has heretofore not treated the fact that McGeorge's franchise was technically held with British Leyland Motor Sales, Inc., a wholly owned subsidiary of British Leyland Motors, Inc. The operational distinction between these two corporations is not clear to the Court. Nevertheless, the shortages suffered by plaintiff were due to the acts of Motor Sales, with whom McGeorge held the franchise contract, and the Court's findings of fact and

conclusions of law are made with respect to that subsidiary only.

Refusal to Renew

The Court finds that Leyland's refusal to renew was amply supported by the provision of the 1968 Dealer Sales Agreement between the parties. No provision of the contract obligated Leyland to renew after its expiration. Additionally, had the contract not expired Leyland had the right to terminate for cause by virtue of the death of the principal, David McGeorge.

Nevertheless, the Court has found that Leyland's sole reason for refusal to renew was its decision to obtain a Richmond area dealer which would handle all three lines. The Court must thus consider whether said refusal was illegal by virtue of an attempted tie-in in violation of the anti-trust laws. Should the full line dealer arrangement which Leyland sought be permissible under the anti-trust laws, Leyland was within its rights not to renew; should it be an illegal tie-in, Leyland's refusal to deal constitutes an actionable violation of the Clayton Act, § 3.[6]

The Court concludes that the relevant case authority supports Leyland's position, i.e. that the full line dealer arrangement was permissible. The Court of Appeals for the Fourth Circuit set out the standards by which legality of a tie-in arrangement is judged under the Clayton Act § 3 in *Advanced Business Systems & Supply Co.* v. *SCM Corp.*, 415 F.2d 55 (1969). Under the Clayton Act the tie-in is illegal if one of two requisites is met:

1. The seller (here Leyland) enjoys a monopolistic position in the market for the tying product (Triumph), or

2. A substantial volume of commerce in the tied product (Rover) is restrained.

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[6] Tie-in arrangements have been held illegal with respect to tie-in of *goods* (under Clayton Act § 3) and *services* (under Sherman Act § 1). This matter properly involves the Clayton Act. See *Advanced Business Systems, infra.*

See, *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953). The Court has no evidence before it on which to form a conclusion as to Leyland's economic power over Triumph's market. Although said conclusion may properly be reached on inference by examination of the success of a tying arrangement, the Court's findings of fact indicate that, if anything, Leyland's failure with Rover is probative of its limited powers in the tying market here. Nevertheless a conclusion *contra* is not necessary to sustain *McGeorge's claim, for a tie-in* "*is automatically* illegal under § 3 whenever 'a substantial volume of commerce in the tied product is restrained'." *Advanced Business Systems, supra*, at 61, citing *Times-Picayune, supra*. The reasonableness of such an arrangement is not at issue under a Clayton Act claim, as in the case herein, although it is for Sherman Act § 1 purposes. *Advanced Business Systems, supra*. Thus, although the Court is impressed with the reasonableness of Leyland's plan, it is nevertheless precluded from considering that factor here and turns instead to the "substantial volume" question.

Ironically, Leyland is, in the Court's opinion, saved from liability here under the strict Clayton Act standards by its own failure in marketing Rovers. While little evidence has been presented with respect to the exact nature of the Rover market, it presumably includes foreign autos selling for about $6000 (including lower priced Mercedes-Benz cars). Whatever the components of that market may be, the Court nevertheless takes judicial notice of the fact that Rover's disastrous failure in the aforesaid Baltimore territorial market (126 cars in 1968, 119 in 1969, and 150 in 1970, Leyland's national sales comprising about 2/10 of 1%, .15% and .05% of all national imports for those years respectively), makes Rover's share of the market de minimis.[7] Absent a

[7] The Court is aware that authorities have differed on whether market share should be calculated quantitatively, in dollars, or qualitatively, in percentages. In *Fortner Enterprises, Inc.* v. *U.S.*

finding of restraint of trade in the tied product's (Rover) market, Leyland's policy is not illegal under the Clayton Act, § 3.

In conclusion, the Court finds that Leyland's refusal to renew was not violative of the Clayton Act.

Damages

Both parties have adduced expert testimony with respect to damages that may have been suffered by McGeorge as a result of the shortage. Unsurprisingly, a cursory glance at the respective estimates would prompt the uninformed observer to conclude that the respective experts were testifying in two completely separate cases. Plaintiff's expert estimated a loss of profit of $708 (1971 value dollars) (see Note 8, *infra*) per car; defendant's expert estimated $68 each. The disparity is not produced by use of different figures but by use of different accounting procedures. The Court will not discuss at length the divergent methods, evidence of which remains amply on the record. A salient summary will suffice.

Plaintiffs' calculations are based on a marginal cost method. The rationale for said method is that costs per unit sold gradually decrease as more cars are sold because costs inherent in the operation are necessarily absorbed by the first units marketed. Under this theory, the seller reaches a point in sales volume where, the costs being taken up by preceding units, profits on subsequent units sold be-

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Steel Corp., 394 U.S. 495 (1969), e.g., $200,000 was held not insubstantial. *Int'l. Salt v. United States*, 332 U.S. 392 (1947) offers the now well cited $500,000 standard. Both figures are exceeded here. The Court nevertheless concludes that a qualitative analysis is just here. The marginal nature of Rover business domestically, borne out by termination of Rover imports in 1971, prompts the Court to that conclusion.

comes unmatched by unit costs. In short, the sale of these latter units is "gravy." Relying on this theory, plaintiff's expert also calculated the profits generated by new car sales in the service and parts department and used car sales and trade-ins.

Defendant's expert used an average cost method, whereby variable costs are allocated to each unit sold on an average basis. Underlying this approach is the theory that car sales, in the auto business, pick up most costs so that the dealer makes his basic (free and clear) profits from service operations.

The Court, of course, can't simply average the two figures in its finding of damages; such a method bears no rational nexus to any recognized accounting method. Rather, the Court must choose that accounting method which in its opinion is just.

The Court concludes that plaintiff's method is the more reasonable. The peculiar nature of the damages suffered here, i.e., shortages in an undersupplied market, suggest that the sale of those cars shorted was dependent only on delivery. Had McGeorge received its 66 cars, it would have sold them. Further costs in promoting those sales would have been minimal and, in fact, costs appurtenant to operation of the Triumph franchise were already absorbed by what Triumph operations plaintiff was able to carry on despite the shortage. The Court thus adopts McGeorge's profit estimate of $708 per car.

Having reached this conclusion, the final step is calculation of damages for shortage of 66 cars at $708 profit each. That figure is obtained by multiplying these figures, and subtracting and estimated increased contribution to over-

head which would have derived from the sale of these cars. The Court adopts plaintiff's calculations in this regard:

Lost contribution to overhead [at the 1964-68 average of $708 (1971 $) per car]

1969: 14 x 708 = 9912 (1971 $) [8850[8] (1969 $)]

1970: 52 x 708 = 36816 (1971 $) [34,732 (1970 $)]

Extra contribution to overhead and profit on Triumphs sold during the period October, 1969 through July, 1970

Gross margin per new Triumph in 1970 (from Table 6):[9] 841 (1971 $)

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[8] The Court declines to compute damages at 1971 dollar value. Original dollar values for 1969 have been calculated by the Court by deflating plaintiff's damages at the 6% rate utilized by McGeorge. For 1969, this calculation is made according to the following formula:

X [1969 value damages] X 1.06 [1970 inflat.] x 1.06 [1971 inflat.] = 9912 [1971 value] x [1969 damages] = 8850

1970: x [1970 value damages] x 1.06 = 36,816 [1971 value] x [1969 value damages] = 34,732

[9] Plaintiff's Expert Report.

Average gross margin per new Triumph, 1964-68:	632
Difference	209 (1971 $)

1969

Estimated increase in gross margin per new Triumph:	209 (1971 $)
X New Triumphs sold during the last quarter	10
= Increased contribution to overhead and profits	2090 (1971 $)[10] [= 1866 (1969 $)]

1970

Estimated increase in gross margin per new Triumph:	209 (1971$)
X New Triumphs sold during January through July, 1971:	27
= Increased contribution to overhead and profits	5643 (1971 $)[10] [= 5324 (1970 $)]

Damages Estimates:

	1969	1970
Loss contribution to overhead and profit	8850	34,732
Less adjustment for increased gross margin	1866	5,324
	6984	29,408

Total $ 36,392

The Court deems interest on said damages appropriate. Said interest shall run at 6% from December 31, 1969 on $6984, and from September 1, 1970 on $29,408.

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[10] Deflated to actual dollar values, see Note 8.

Defendant British Leyland Motor Sales, Inc. shall be ordered to pay over in judgment to David R. McGeorge Car Co., Inc., the sum of thirty-six thousand, three hundred and ninety-two ($36,392) dollars, with interest as specified, *supra.*

An order consistent with this memorandum shall issue.

ROBERT R. MERHIGE, JR.
United States District Judge

Date: JAN. 9, 1973

ORDER OF JANUARY 9, 1973

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 346-71-R

DAVID R. MCGEORGE CAR CO., INC.

v.

BRITISH LEYLAND MOTORS, INC., ET AL.

ORDER

For the reasons stated in the memorandum of the Court this day filed, it is ADJUDGED and ORDERED that:

1. The defendant recover nothing of the plaintiff on its counterclaim, and

2. The plaintiff recover of the defendant, Leyland Motor Sales, Inc., the sum of Thirty-six Thousand Three Hundred Ninety-two ($36,392.00) Dollars with interest at 6% per annum on $6,984.00 from December 31, 1969, and on $29,408.00 from September 1, 1970, and its cost expended.

Let the Clerk send copies of the memorandum and this order to all counsel of record.

ROBERT R. MERHIGE, JR.
United States District Judge

Date: JAN. 9, 1973

SUPPLEMENTAL MEMORANDUM AND ORDER OF APRIL 10, 1973

[Filed April 10, 1973]

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 346-71-R

DAVID R. McGEORGE CAR CO., INC.

v.

BRITISH LEYLAND MOTORS, INC., ET AL.

This antitrust action came to trial before the Court on December 14, 1972, pursuant to which the Court entered judgment in favor of the plaintiff in the amount of $36,392.00, plus interest. See the Court's Order and Memorandum of January 9, 1973. Subsequently, it came to the attention of the Court that it may have erred in its conclusions of law with respect to liability under the Robinson-Patman Act, and the Court upon its own motion vacated the judgment. See Order of January 17, 1973. Counsel were requested to file with the Court such memorandum as they deemed appropriate in regard thereto, and have done so. Plaintiff's counsel has also urged the Court to reconsider several other legal issues, upon which both counsel have submitted memoranda.

Because technically judgment has not been entered in this action, the Court will adhere to its long standing rule that memoranda from counsel will always be welcomed and read up to the time of judgment and it will thus consider these additional points. Nevertheless, except as noted below, the Court herein adopts by reference its findings of fact and conclusions of law of January 9, 1973.

The issues raised by counsel will be discussed below *in seriatim:*

I. Liability Under Robinson-Patman Act

In its findings of January 9, 1973, the Court determined that McGeorge had been shorted 66 cars over the challenged period and concluded that said shortage presented an actionable claim for relief under the Robinson-Patman Act. On that basis the Court found that McGeorge was entitled to damages but not to treble damages. In the latter respect, all counsel and the Court are agreed that the Court erred: treble damages properly flow from a violation of Clayton Act § 2(e) (as amended by the Robinson-Patman Act § 1), 15 U.S.C. § 13(e).[1] Clayton Act § 4, 15 U.S.C. § 15, see, *e.g., Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969).

While not disputing the treble damages issue, defendants have raised objections to the Court's initial conclusion that they are liable under the Robinson-Patman Act. Those objections are, in the main, twofold, consisting of, as stated by defendants, the following:

a. There was no violation of [the Robinson-Patman Act,' 15 U.S.C. § 13(e)].

b. If there was, plaintiff failed to prove that it was damaged by any "discriminatory" delays in deliveries.

Leyland's second contention is that even if a violation of the Robinson-Patman Act is found, McGeorge has failed to prove damages suffered thereby. Defendants in effect contend that the showing required here is two-part:

1. That McGeorge was discriminated against in the form of reduced deliveries.

2. That as a result of said reduction, McGeorge lost customers to competitors, which loss provides the measure of damages.

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[1] Hereinafter referred to as 15 U.S.C. § 13(e) or "Robinson-Patman Act."

Defendants further contend that McGeorge had not met the second burden.

The Court disagrees with this interpretation as applied to the case. The law is well-settled that damages in Robinson-Patman Act cases are measured by the showing of a causal relationship between losses suffered and the act of discrimination. *Dantzler* v. *Dictograph Products, Inc.*, 309 F.2d 326 (4th Cir. 1962). Thus, for example, in cases of *price* discrimination, the measure of damages is not adduced from the difference between prices paid by the claimant alleging discrimination and his competitors, but from the lost profit on sales the claimant would have retained had it not suffered price discrimination. See *Enterprise Industries* v. *Texas Co.*, 240 F.2d 457 (2d Cir. 1957). Similarly, in traditional "service" (*e.g.*, advertising, discrimination, damages must be shown by proof of customers—and profits—lost as a result of said discrimination. See *Dantzler*, *supra*, 309 F.2d 326. In each of these situations, however, what is measured is the damages which flow to the victim of discrimination as a result of the act of discrimination, not the benefit derived therefrom by the victim's competitors.

In this action, by the nature of the discrimination, the measure of damages is easily determined: it consists of those autos denied McGeorge for resale by virtue of the discriminatory policy. What he did not have, he could not sell and, inversely as the Court has found, what he did have he could sell. McGeorge has thus demonstrated damages resulting from the discrimination as measured by the actual shortage figure. Translated into dollars, as the Court has done in its memorandum of January 9, 1973, that amount is $36,392. Trebled, the measure of damages is $109,176. McGeorge is also entitled to reasonable attorney's fees, 15 U.S.C. § 15. Consistent with the Court's practice in that regard, respective counsel shall be directed to settle on an appropriate figure. If they fail to do so the Court will entertain an appropriate motion at the proper time.

II. Renewal: Application of Dealer's Day in Court Act

The plaintiff urges that Leyland's refusal to renew the dealership contract was a violation of the Dealer's Day-in-Court Act, 15 U.S.C. § 2222. In support thereof it cites several passages from legislative history which merely substantiate what the statute itself says in part. That an auto-dealer shall recover damages from a manufacturer who in bad faith refuses to renew a franchise. This Court has found, however, that although Leyland acted in bad faith with respect to the shortages, the refusal to renew was the result of what appears to the Court to have been a rational business decision. Absent bad faith in this regard, no recovery can be had under the statute. *RAC Motors, Inc. v. World-Wide Volkswagon Corp.*, 314 F. Supp 681 (D. N.J. 1970). The statute is not addressed to a "lack of good faith in the ordinary sense, but a lack of good faith in which 'coercion, intimidation or threats' are at least implicit." *Globe Motors v. Studenbaker-Packard Corp.*, 328 F.2d 645 (3d Cir. 1964). While the shortage complained of was part of a coercive effort of defendant to induce McGeorge to take on the Rover line, the ultimate decision not to renew was made after the failure of said effort and not as a continuing part thereof. McGeorge's claim on this count is without merit.

III. Refusal to Renew: Tie-In Under Clayton Act § 3 and Sherman Act § 1

The plaintiff has raised serious objections to the Court's conclusions of law in this regard. Although for reasons stated *infra* the Court declines to alter its ultimate conclusion, the Court is nevertheless constrained to clarify and explicate its views.

The Court has found that the tying arrangement complained of is both in effect and in scope *de minimis*. In this context, the Court concluded that McGeorge failed to prove either that Leyland had a dominant position in the tying

market (Triumph's market) by which it could effect the tying arrangement on a broad scale or that a "not insubstantial" amount of competition in the tied product (Rover) had been forestalled. Proof of either would demonstrate an illegal tie-in *per se* under Clayton Act § 3. *Advance Business Systems* v. *SCM*, 415 F.2d 55 (4th Cir. 1969). Plaintiff here contests both conclusions as well as the Court's application of a qualitative substantiality test to the latter requirement. In this respect plaintiff's position may be well taken,[3] but in view of another problem is academic.

An initial prerequisite to application of § 3 is the so-called "Exclusionary Condition," by which is meant that as an element of the challenged arrangement the "victim," for want of a better term, is forced to forego the use or purchase of competitive products. See *McElhenney Co.* v. *Western Auto Supply Co.*, 269 F.2d 332 (4th Cir. 1959). The Exclusionary Condition need not be formalized but may in fact be met by the practical operational effect of the proposed arrangement. *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451, 456-7 (1922); *Signode Steel Strapping Co.* v. *FTC*, 132 F.2d 48 (4th Cir. 1942). Thus, for example, the copy machine manufacturer which ties the use of its own copy paper to the leases of its machines, thereby in practical effect foreclosing the competitive use of

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[3] The proper inquiry is whether a "not insubstantial" amount of commerce in the tied product has been affected. Application of this test requires measurement of sales of the tied product, and accordingly, in this context, the sale of "tied" Rovers. In this respect, the Court erred in taking into account *all* Rovers sold in the Baltimore territorial market. The evidence is unclear as to territorial or even national sales of *tied* Rovers. The sales in Virginia, however, for 1970 and 1971, amount to approximately two dozen "tied" Rovers, the *retail* value of which does not exceed the $200,000 amount named in *Fortner Enterprises, Inc.* v. *U. S. Steel Corp.*, 394 U.S. 495 (1969), or the $500,000 standard of *Int'l. Salt* v. *United States*, 332 U.S. 392 (1947). Whether sales for the entire tied market exceeds these figures is, though probable, not proven by the evidence.

other brand papers, fulfills the Exclusionary Condition. See *Advance Business Systems, supra.* Absent the Exclusionary Condition, competition is not, in effect, impeded for purposes of § 3 even though, as here, commerce between buyer and seller may not be truly reflective of market demand for the tied product.[4] There is no evidence here that Leyland, as part of its tie-in scheme, formally required McGeorge to forego the sale of Mercedes-Benz autos (roughly competitive with Rover). Nor is it certain that the practical result would have been the same. To the *contrary*, McGeorge did eventually offer to sell the Rover line at a different location, Mercedes' objections notwithstanding. McGeorge has not proved the Exclusionary Condition herein, and as such, is precluded from further asserting a Clayton Act § 3 claim, and for reasons that follow, a Sherman Act § 1 claim on that basis.

Sherman Act § 1, 15 U.S.C. § 1, prohibits contracts in restraint of trade or commerce. One of the judicial theories explicative of this prohibition has been given the rubric of "Refusal to Deal," the gravamen of which theory has been aptly stated by plaintiff:

> The general rule, therefore, is that a manufacturer may establish a policy and refuse to deal with those not adhering to it *only* in the absence of any arrangement or combination restraining trade. He may not do so in furtherance of an illegal or prohibited scheme. Plaintiff's Trial Memorandum at p. 8. *See United States* v. *Parke, Davis & Co.*, 352 U.S. 29 (1960).

Traditionally arrangements restrain trade, for the purposes of this theory, if they are addressed to certain illegal purposes, for example the elimination of price-cutting dealers, see *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207 (1958) or the exclusion of new competition from the market, see *Radiant Burneys* v. *Peoples Gas Co.*, 364 U.S.

[4] Claims in that regard are properly litigated under Sherman Act § 1, discussed *infra.*

656 (1961). Additionally, the Court of Appeals for the Fourth Circuit has held that a refusal to deal which is motivated by the attempt to enforce an illegal tie-in is also violative of Sherman Act § 1. *Osborn* v. *Sinclair Refining Co.*, 324 F.2d 566 (4th Cir. 1963). Clearly, however, a preliminary requirement in this regard is the finding of an illegal tie-in scheme. McGeorge has, however, not proved an illegal tie-in and its reliance on this Sherman Act theory is therefore misplaced. Further, absent restraint of trade (and the Court has found none here of greater than a *de minimis* amount), recovery under $1 on any theory is foreclosed.

IV. The Counterclaim: Spare Parts.

The Court has been urged by McGeorge to reconsider its findings with respect to the counterclaim by Leyland for payments owing on spare parts, and McGeorge's set-off for Leyland's alleged breach of promise to repurchase unsold spare parts following non-renewal. In support thereof, McGeorge has offered proof of the exact state of said inventory at present. In response Leyland claims that McGeorge has failed to comply with the thirty day provision of the 1968 Dealership Contract for return of parts. The Court, nevertheless, declines to alter its findings. It is not clear, for example, how much of that inventory McGeorge has retained for purposes of serving his former Triumph customers, or for that matter whether Leyland waived the thirty day rule with respect to part or all of said inventory. In short, the Court has found that neither party has met its burden of proof and the Court chooses not to alter that finding.

An order consistent with this supplemental memorandum and the memorandum of January 9, 1973, as incorporated by reference, shall enter.

Robert R. Merhige, Jr.
United States District Judge

Date: April 10, 1973

ORDER OF APRIL 10, 1973

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 346-71-R

DAVID R. MCGEORGE CAR CO., INC.

v.

BRITISH LEYLAND MOTORS, INC., ET AL.,

ORDER

For the reasons stated in the memorandum of the Court this day filed, it is ADJUDGED and ORDERED that:

1. The defendant recover nothing of the plaintiff on its counterclaim, and

2. The plaintiff recover of the defendant, Leyland Motor Sales, Inc., the sum of One Hundred and Nine Thousand, One Hundred and Seventy-six ($109,176.00) Dollars, and its costs expended, with interest from this date. Counsel are directed to meet in accordance with the memorandum in an effort to settle upon an appropriate figure for an award of counsel fees.

Let the Clerk send copies of the memorandum and this order to all counsel of record.

ROBERT R. MERHIGE, JR.
United States District Judge

Date: APRIL 10, 1973

AUTOMOBILE DEALERS DAY IN COURT ACT
15 USCA §§ 1221-1225

§ 1221. *Definitions*

As used in this chapter—

(a) The term "automobile manufacturer" shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

(b) The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract.

(c) The term "automobile dealer" shall mean any person, partnership, corporation, association, or other form of business enterprise resident in the United States or in any Territory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons.

(d) The term "commerce" shall mean commerce among the several States of the United States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or among the Territories or between any Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation,

endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith. Aug. 8, 1956, c. 1038, § 1, 70 Stat. 1125.

§ 1222. *Authorization of suits against manufacturers; amount of recovery; defenses*

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided*, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith. Aug. 8, 1956, c. 1038, § 2, 70 Stat.

§ 1223. *Limitations*

Any action brought pursuant to this chapter shall be forever barred unless commenced within three years after the cause of action shall have accrued. Aug. 8, 1956, c. 1038, § 3, 70 Stat. 1125.

§ 1224. *Antitrust laws as affected*

No provision of this chapter shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States. Aug. 8, 1956, c. 1038, § 4, 70 Stat. 1125.

§ 1225. *State laws as affected*

This chapter shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this chapter and an express provision of State law which can not be reconciled. Aug. 8, 1956, c. 1038, § 5, 70 Stat. 1126.

SECTION 1 OF THE SHERMAN ACT
15 U.S.C. § 1

§ 1. *Trust, etc., in restraint of trade illegal; exception of resale price agreements; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commondity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 593; July 7, 1955, c. 281, 69 Stat. 282.

FEB 28 19
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-929

DAVID R. McGEORGE CAR CO., INC.,
Petitioner,

v.

LEYLAND MOTOR SALES, INC.,

—and—

BRITISH LEYLAND MOTORS, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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February 26, 1975

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Petitioner, a retail dealer in imported automobiles in Richmond, Virginia, brought this action because Leyland Motor Sales, Inc. ("Leyland")* refused to renew petitioner's two-year Triumph dealership contract on expiration in July 1970. The primary claim was a violation of the Automobile Dealer Day in Court Act, 15 U. S. C. § 1221-25, but other claims under the antitrust laws and the Robinson-Patman Act were joined.

*British Leyland Motors, Inc., Leyland's parent, is incorrectly named as a respondent. The action against it was dismissed (1a [in Appendix to Petition]).

In the District Court, the petitioner prevailed on (a) its claim under the Robinson-Patman Act, and (b) a claim that it had been "shorted" in the number of Triumphs made available to it during the last two years of its dealership. Its other damage claims, derived from the fact of non-renewal, were rejected. In the Court of Appeals, Leyland did not dispute the determination under (b) but appealed from the judgment for damages under the Robinson-Patman Act. Petitioner cross-appealed on its rejected claims.

The Court of Appeals unanimously reversed the District Court on the Robinson-Patman damages, and upheld it on the other issues, except that it reduced the damages awarded for "shorting" petitioner in the number of Triumphs supplied. A rehearing in banc was denied.

Statement of the Case

While the petition presents the Questions contentiously, more as a summary of petitioner's arguments than as a statement of the issues decided, it sufficiently identifies those issues for these purposes.

David R. McGeorge Car Co., Inc. was a dealer in imported automobiles. In the years 1963-1970, one of the lines it carried was Triumph manufactured in the United Kingdom and distributed here by Leyland. By 1969, Triumph was the smallest of the three lines carried by McGeorge, which in that year sold 119 Mercedes-Benzes, 246 Toyotas and 77 Triumphs (8a, n. 13).

As a result of the 1967 merger in the United Kingdom of the Triumph and Rover manufacturing companies, Leyland undertook the marketing of the Rover luxury sedan in the United States. Rover was not selling well (in 1971 it was withdrawn from the U. S. market), and Leyland tried to rescue it by marketing it through the

Triumph sales organization (15a). Triumph dealers were asked to take on Rover as an added line. Some did; some, including McGeorge, did not. While the addition of Rover would have involved purchasing only one or two cars, a sign, and a few hundred dollars worth of special tools, David McGeorge was concerned about the effect this would have on his principal supplier, Mercedes-Benz, which he was afraid would cancel him if he took on the Rover line (15a).

On the expiration of the Triumph dealership contract in July 1970, Leyland moved the Triumph line to another Richmond dealer who agreed to handle Rover as well. David R. McGeorge seemingly acquiesced in this, but died two months later, and his son, who took over the business, began this lawsuit the following year.

The Decisions Below

The District Court rejected McGeorge's primary claim for damages for non-renewal of the franchise under the Dealer Act, holding that the Act did not compel Leyland to keep McGeorge indefinitely as its Richmond Triumph dealer, and that the refusal to renew was a "rational business decision" not characterized by an absence of "good faith" under the Dealer Act (33a). The Court of Appeals agreed that Leyland "had a perfectly legitimate reason not to renew its Triumph franchise" and such decision was "based on sound business considerations free from the 'coercion and intimidation' proscribed by the Act" (7a). Moreover, as the Court observed (8a, n. 13), Toyota was pressing McGeorge to drop Triumph, and this "played a significant part in Leyland's decision to seek another dealer who could guarantee more permanency".

The District Court found that some of the cars McGeorge would normally have received in 1969-70 were

withheld during a time of scarcity because McGeorge would not add the Rover line. Leyland did not dispute this determination, and the Court of Appeals affirmed, although it upheld Leyland's claim that the damages awarded were excessive because of miscalculation by the District Court of the number of cars to which McGeorge was rightfully entitled.

Both the District Court and the Court of Appeals *rejected* McGeorge's claim under the antitrust laws that Leyland had unlawfully sought to tie the sale of Rovers to the more successful Triumph model.

Plaintiff's last claim was that Leyland had discriminatorily withheld the service of "delivery" as to the cars involved in the shortage, thus violating the Robinson-Patman Act. The District Court upheld this claim, originally under the misapprehension that only single damages were recoverable, and these were duplicative of the damages allowed under the Dealer Act, but the Court later corrected its error and trebled the damages (31a). The Court of Appeals reversed the District Court on this issue, by distinguishing (instead of rejecting) a Seventh Circuit decision on which the lower court had relied.

Question 1

THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE DEALER ACT ISSUE

The courts below recognized that plaintiff's claim under the Dealer Act for non-renewal, if accepted, would grant permanent tenure to McGeorge as a Triumph dealer in Richmond, and would leave Leyland helpless to remove the Triumph line from its weak and vulnerable position at the McGeorge dealership to a more promising sales outlet. The Court of Appeals agreed with the District Court that the

Act did not compel such an absurd result and that Leyland was free to move the line elsewhere because of "sound business considerations free from the 'coercion and intimidation' proscribed by the Act" (7a).

Petitioner perceives in this a "direct conflict" with earlier decisions of the Second and Tenth Circuits, as well as an unwarranted and illegal extension of the defense of good faith that Congress made available under the Act. Neither contention has any validity.

1. Both the Second Circuit in *Autowest, Inc.* v. *Peugeot, Inc.*, 434 F. 2d 550 (1970), and the Tenth Circuit in *American Motors Sales Corp.* v. *Semke*, 384 F. 2d 192 (1967),* were confronted with jury verdicts resolving questions of good faith under the Act in the dealer's favor. In *Autowest* the jury found that the distributor had been terminated for its refusal to adhere to the manufacturer's suggested resale prices; in *Semke*, the jury found that the dealer had justifiably terminated his dealership because of (a) refusal to approve the dealer's warranty claims and (b) unlawful pressure from the manufacturer to "package" his purchases, *i.e.*, to accept less desirable models as the price of having an order filled for the models then in demand. Both courts held there was sufficient evidence of coercion and intimidation to support the verdict for the plaintiff. This case, by way of distinction, involved not a termination, but a fulfillment of the contract term, followed by a transfer of the dual lines to another dealer not disabled from accepting them by his commitments to other suppliers, as McGeorge was to Mercedes-Benz.

Petitioner finds a conflict with the Second Circuit's condemnation of manufacturer-oriented clauses requiring a dealer to take "a large stock of cars". This is not so. There

*Both cases were cited by the Court of Appeals (5a-6a), with no apparent awareness of any conflict with its own decision.

is a wide difference between trying to overload a dealer, to foster the manufacturer's sales, and asking him to take on an extra line which was not separately viable. Both the District Court and the Court of Appeals fully appreciated this; it seems clear that neither the Second nor the Tenth Circuit would have viewed the case any differently.

2. Petitioner is greatly offended by the willingness of the Court of Appeals to accept a good-faith defense of marketing necessity. But as the Court noted, with ample citation of authority, the Act does not create an indissoluble bond between automobile manufacturer and dealer (7a). There is no discernible difference between those cases upholding the right of the manufacturer to terminate or refuse to renew a dealership and the present one where "Leyland acted in the reasonable belief that its business welfare required a dual dealership arrangement" (8a).

3. Petitioner urges this Court to issue a "definitive" decision construing the Dealer Act. But it fails to show that the Courts of Appeals have been uncertain about the construction of the Act or have arrived at irreconcilable positions. The Act is, after all, simply a good-faith statute, where the trier of the fact, jury or court, must decide whether the manufacturer's action was in good faith, or whether it was characterized by the coercion or intimidation that is bad faith.

Question 2

THE REVERSAL OF THE ROBINSON-PATMAN CLAIM WAS NOT BASED ON FACTS SUBSTITUTED BY THE COURT OF APPEALS

Because petitioner cannot show any conflict between circuits as to the disposition of its claim under § 2(e) of the Robinson-Patman Act, it instead attacks the decision

below as involving an unwarranted "substitution" of factual findings for those of the District Court. Such an issue is not worthy of the attention of this Court.

Petitioner concedes that, while the Fourth Circuit indicated "some disagreement" with the Seventh Circuit holding in *Centex-Winston Corp.* v. *Edward Hines Lumber Co.*, 447 F. 2d 585, *cert. den.* 405 U. S. 921 (1972), it distinguished the case, and did not refuse to follow it.* The Seventh Circuit had held (on demurrer) that a claim of consistently late deliveries in violation of contract, while competitors were favored with prompt deliveries, could constitute a § 2(e) violation.

Petitioner appears to argue that the Court of Appeals was forced into a *Centex-Winston* confrontation because of the District Court's remark that a "major service" in Leyland's distribution functions was "delivery of cars from the docks upon import" (21a). Petitioner (p. 13) somehow transmutes this into a finding that "trade custom and usage" called for Leyland to make agreed upon deliveries to its buyers. There was no such finding; but it was not necessary for the Court of Appeals to question the basis for the District Court's remark. It focused instead on the contract between the parties, which the Court found "required McGeorge to accept delivery of Triumphs at their point of arrival in Baltimore or engage independent transporters at its own risk" (4a). It was justified in relying on these contract provisions. See *Emor, Inc.* v. *Cyprus Mines Corp.*, 467 F. 2d 770, 773 (3d Cir. 1972).

Leyland pointed out below, and it will bear repeating, that if McGeorge is allowed a Robinson-Patman recovery on this theory, the federal courts could expect a wave of

*The case cited by petitioner as indicative of District Court refusal within the Fourth Circuit to follow *Centex-Winston* is from the Middle District of Tennessee, in the Sixth Circuit.

§ 2(d) and (e) claims from every unhappy buyer claiming a breach of a supply contract.

Question 3

THE COURT OF APPEALS PROPERLY CORRECTED THE DISTRICT COURT'S ERROR IN COMPUTING DAMAGES

It is surprising that petitioner would seriously propose this as a point for review in this Court.

The District Court made an obvious error in counting the number of cars on which McGeorge was "shorted", and which were used to compute McGeorge's damages under the Dealer Act. Leyland pointed out to the Court of Appeals that in effect the District Court had counted the same cars twice. The Court agreed, and reduced the number of cars, although leaving untouched the unit lost-profit figure (11a-12a).

Petitioner complains that Leyland never raised the point in the District Court. This is mystifying. It is not explained how Leyland was supposed to anticipate the District Court's error. And in asserting it never had a chance to respond to Leyland's argument in the Court of Appeals, petitioner has obviously forgotten pp. 36-37 of its main brief below, where its response was set forth.

Question 4

THE COURT OF APPEALS CORRECTLY HELD THAT LEYLAND'S REFUSAL TO RENEW PETITIONER WAS NOT PURSUANT TO AN UNLAWFUL TIE-IN ARRANGEMENT

Petitioner lastly argues that review is warranted in this case because the Court of Appeals, in rejecting its § 1 Sherman Act and § 3 Clayton Act tie-in claims, failed to evaluate respondent's conduct by the standards of *per se*

liability established in *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594 (1953), and *Fortner Enterprises* v. *United States Steel Corp.*, 394 U. S. 495 (1969).

This ignores the minimum conditions that a tie-in claim must meet in order to bring the *per se* rules into effect. *Fortner* (394 U. S. at 500) teaches that "the controlling consideration" is whether the total amount of business foreclosed to competitors is "substantial enough in terms of dollar volume so as not to be merely *de minimis*." Both courts below answered this threshold question adversely to petitioner's contention. While petitioner now gives the fanciful figure of $40 million (it was $16 million in the Court of Appeals), it not only fails to cite any record support for that claim, but omits to note that the District Court had found a failure of proof as to the number of tied products outside Virginia, where only about two dozen Rovers were tied to Triumph over a two-year period (33a). As their value was well below the figure mentioned in *Fortner* and elsewhere, the District Court observed that the alleged tie-in was "both in effect and scope *de minimis*" (33a). Another factor noted by the Court was that the scheme failed, showing a lack of market power on Leyland's part as to both the tying and the tied product.

Thus the record effectively blocks petitioner's claim that the arrangement was *per se* unlawful, rendering it necessary to consider whether Rover's competitors were excluded from the market. Presumably the need to prove that the arrangement was not so small as to preclude any competitive impact is one of the reasons underlying the *de minimis* rule. As the Court of Appeals noted, "Leyland's conduct did not impede or tend to impede competition between Rover and the other cars in its style and price range" (11a). And the circumstance that McGeorge was already under the constraints effected by his existing commitments to Mercedes-

Benz was another reason why his claim against Leyland was absurd on its face.

In *White Motor Co.* v. *United States*, 372 U. S. 253 (1963), this Court noted "the importance of the nature of the tying arrangement in its factual setting" and quoted its earlier language in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 330 (1962), tolerating the use of the tying device "by a small company in an attempt to break into a market." Therein lies the story of this case.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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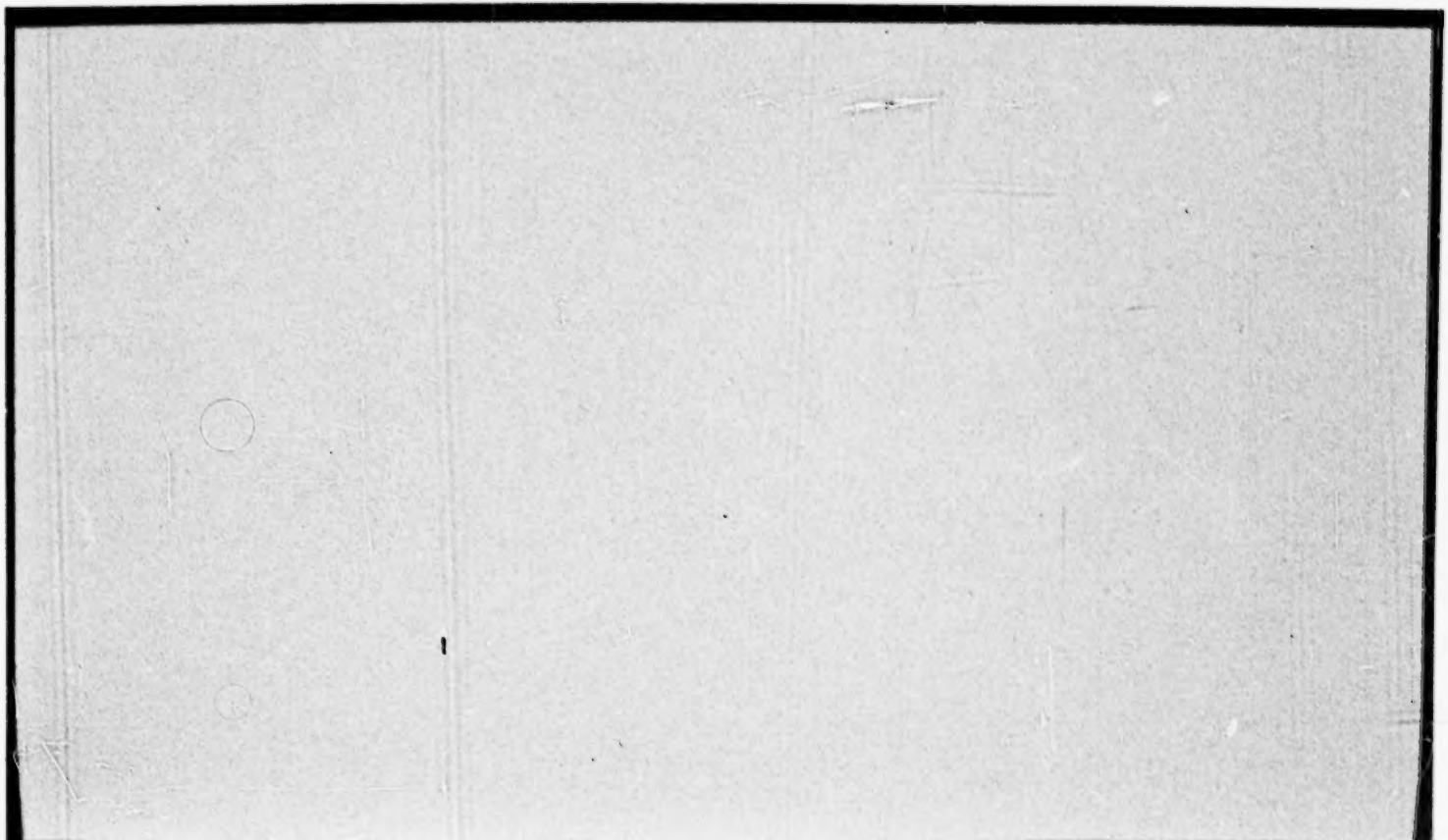

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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DEALER ACT ISSUE

Rather than specifically reply to the mischaracterizations and misapplications of facts and law in Respondents' Brief, Petitioner asserts, and the record is absolutely clear, that the following is uncontroverted.

Petitioner had been an excellent Triumph dealer since 1963 and, in fact, had been one of the leading Triumph dealers in the State of Virginia. The failure to renew its franchise was due *solely* to its refusal to accede to Respondents' nationwide marketing scheme.

Under that scheme, all Triumph dealers—during a period of shortage of Triumphs—were told that their desirable Triumph franchises would be terminated unless they agreed to purchase from Respondents unwanted Rover automobiles.

Indeed, unless Petitioner had been a good dealer, there would have been no reason for Leyland to attempt to so coerce and intimidate him to purchase such Rover automobiles.

As an integral part of this scheme of coercion and intimidation, Petitioner and other similar dealers were actually shorted their fair share of Triumph automobiles unless they agreed also to purchase the Rovers.

It is this coercion and intimidation that both the Trial Court and the Fourth Circuit found actionable under the Dealers Day In Court Act up to the time of nonrenewal.

Both Courts, however, stated in effect that despite such coercion and intimidation up to the time of nonrenewal, Respondents were justified in failing to renew Petitioner's franchise because it was a "rational business decision".

Thus, under the Fourth Circuit decision, the same illegal activity which resulted in a verdict for damages suffered prior to the termination and which itself was the sole cause of termination is protected from termination damages because of Respondents' alleged "rational business decision".

The character of the national marketing scheme did not change before and after nonrenewal. The scheme was clearly proscribed prior to nonrenewal, but, according to the Fourth Circuit, justified by alleged

business reasons after nonrenewal. The findings are inconsistent within themselves and are in conflict with decisions in point in other Circuits.

The decisions of the Second Circuit in *Autowest, Inc.* v. *Peugeot, Inc.*, 434 F.2d 556 (2d Cir. 1970) and the Tenth Circuit in *American Motor Sales Corporation* v. *L. G. Semke*, 384 F.2d 192 (10th Cir. 1967), clearly reject a defense of "business justification" for termination benefiting only the manufacturer under the Dealers Day In Court Act.

In addition, it is undisputed that the Fourth Circuit reached into the record and excerpted a letter relating to Toyota—on which there was no testimony whatever in the trial and which was not considered by the Trial Court—and drew conclusions which were both contrary to the admission of Respondents themselves and the findings of the Trial Court that Petitioner's failure to purchase Rover automobiles was the sole reason for its nonrenewal.

If the Fourth Circuit decision prevails, the Dealers Day In Court Act is left toothless inasmuch as manufacturers almost always have, from their point of view, a good business reason for their coercion and intimidation.

The Act does not require a marriage for life. Its only purpose is to guarantee the dealer freedom from the coercion and intimidation of the manufacturer. That coercion and intimidation is actionable whether it relates to damages suffered prior to termination because of the prohibited conduct or whether it relates to damages suffered after termination as a result of the dealer not acceding to the prohibited conduct.

ROBINSON-PATMAN CLAIM

In regard to the Fourth Circuit's reversal of the Trial Court on the Robinson-Patman Act, the Circuit entirely disregarded the finding of the Trial Judge in regard to custom and usage and looked only to the contract itself. There is no evidence in the record to support the terms and provisions of the contract as expropriated by the Fourth Circuit. In fact, Respondents never offered any testimony at trial demonstrating or even indicating that deliveries were complete upon arrival of shipments at port.

To the contrary, all relevant evidence and findings of fact by the Trial Judge, establish that the historical, usual and customary practice of Respondents was to deliver ordered vehicles to Petitioner's and other dealers' places of business. Pursuant to such delivery service, Respondents' field personnel testified that delivery of Petitioner's Triumphs was delayed on the truck so as to permit priority delivery of Triumphs to dealers who also purchased Rovers.

Simply, there is no basis for the Fourth Circuit's disregard of explicit Trial Court findings of fact on this count, and for the Circuit's unfounded substitution of facts contrary to the record.

TIE-IN ARRANGEMENT

In regard to the illegal tie in, neither the Trial Court nor the Fourth Circuit based their decisions on the lack of sufficient commerce. Rather, they based their Opinions on the lack of evidence of an "exclusionary condition".

Section 3 of the Clayton Act, of course, applies to both tie-ins and exclusive dealing. There was no testimony in the Trial Court on exclusionary conditions

because this is a tie-in and not an exclusive dealing situation.

Both Courts, therefore, ignored this Court's tie-in decisions under a misapprehension that there is no difference between a tie-in and an exclusive dealing violation. They applied the wrong law.

A Supreme Court decision in this matter would help to clarify the distinction between tie-in and exclusive dealing arrangements under Section 3 of the Clayton Act. It would *also* correct misapprehensions in lower courts as to the difference in proofs required as a condition to a finding of a *per se* violation under an illegal tie-in challenged under the Sherman Act and one challenged under the Clayton Act.

Finally this case is not as Respondents argue, a matter of a small manufacturer attempting to break into the market. British Leyland was and is the General Motors of England. Triumph was a highly desirable automobile as were the Austin Healy and MG, also manufactured and marketed by British Leyland.

Their argument is akin to asserting that Edsel was merely a small manufacturer attempting to break into the automotive market without mentioning that Edsel was manufactured and marketed by the Ford Motor Company.

Likewise, if after it was clear to Ford that there was no market for Edsels, it attempted to force all of its Ford dealers to purchase Edsels as a condition of receiving their quota of Fords and not having their Ford dealerships terminated, is there any question but that both a violation of the antitrust laws and the Dealers Day In Court Act would result?

CONCLUSION

For the reasons stated above, the Petition for the Writ of Certiorari should be granted.

Respectfully submitted,

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